OFFICE OF INFORMATION PRACTICES

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To: House Committee on Health

From: Cheryl Kakazu Park, Director

Date: February 5, 2014, at 8:35 a.m.
State Capitol, Conference Room 329

Re: Testimony on H.B. No. 2532
Relating to Health Care Privacy.

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") is opposed to this bill, which would require OIP to administer a new health care privacy law.

OIP does not have the resources to administer this new law as proposed in the bill, which would entail adopting two sets of rules on electronic disclosure of health information and safeguards for maintaining health information, as well as providing advice, training, technical assistance, and guidance on the new law.

OIP also questions the need for such a law, given the existing federal rules setting standards for health care information privacy as well as electronic transmission of health care information and technical standards for how to securely maintain such information. OIP therefore requests that this Committee hold this bill.

Thank you for the opportunity to testify.

Healthcare Association of Hawaii

Wednesday – February 5, 2014 – 8:35am
Conference Room 329

The House Committee on Health

To: Representative Della Au Belatti, Chair
Representative Dee Morikawa, Vice Chair

From: George Greene
President & CEO
Healthcare Association of Hawaii

Re: Testimony in Opposition
HB 2532 — Relating to Health Care Privacy

The Healthcare Association of Hawaii (HAH) is a 116 member organization that includes all of the acute care hospitals in Hawaii, the majority of long term care facilities, all the Medicare-certified home health agencies, all hospice programs, as well as other healthcare organizations including durable medical equipment, air and ground ambulance, blood bank and respiratory therapy. In addition to providing quality care to all of Hawaii's residents, our members contribute significantly to Hawaii's economy by employing nearly 20,000 people statewide.

Thank you for the opportunity to testify in opposition to HB 2532, which would create a new chapter changing the way protected health information may be disclosed, allow for private civil actions—which would include attorneys' fees and punitive damages—for violations of the chapter, and make certain violations of the chapter a felony.

After review of HB 2532, several of our members' privacy officers raised serious concerns over the effects of the bill. HB 2532 would impose new privacy mandates on healthcare providers in addition to requirements under which providers currently operate pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). (Pub.L. 104–191, 110 Stat. 1936.) And the measure provides no guidance as to its intended effect on providers who operate in compliance with HIPAA. As such, HB 2532 would impose overlapping and duplicative privacy mandates on providers who are currently in compliance with HIPAA, resulting in additional and unnecessary administrative burdens, legal uncertainty under competing statutes, and exposure to harsh penalties and liability for noncompliance. Further, the mandates of HB 2532 may conflict with the requirements of HIPAA, creating further legal uncertainty because sections of HB 2532 may be preempted by HIPAA.

Because of serious concerns with HB 2532, HAH respectfully requests that the measure be deferred until a full analysis of its impacts may be undertaken by HAH and its members.

Thank you for the opportunity to testify in opposition to HB 2532.

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HMSA

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LATE

February 5, 2014

The Honorable Della Au Belatti, Chair
The Honorable Dee Morikawa, Vice Chair
House Committee on Health

Re: HB 2532 – Relating to Health Care Information Privacy

Dear Chair Belatti, Vice Chair Morikawa and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 2523 which specifies conditions under which individual health care information can be used or disclosed, and provides penalties. HMSA has concerns with the Bill as drafted.

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) already provides federal protections for personal health information (PHI) held by "covered entities" (e.g., health plans and healthcare providers). The Security Rule in HIPAA specifies a series of administrative, physical, and technical safeguards for covered entities to use to assure the confidentiality, integrity, and availability of electronic protected health information.

The State Security Breach of Personal Information statute, Chapter 487N, HRS, already acknowledges the superiority of HIPAA and deems plans and providers to be in compliance with that State statute. Section 487N-2(g, HRS,) provides as follows:

> *...(g) The following businesses shall be deemed to be in compliance with this section:*
>
> *(1) A financial institution that is subject to the federal Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice published in the Federal Register on March 29, 2005, by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, or subject to 12 C.F.R. Part 748, and any revisions, additions, or substitutions relating to the interagency guidance; and*
>
> ***(2) Any health plan or healthcare provider that is subject to and in compliance with the standards for privacy or individually identifiable health information and the security standards for the protection of electronic health information of the Health Insurance Portability and Accountability Act of 1996***.
> [Emphasis added.]

HMSA believes that this Bill is duplicative of obligations specified under HIPAA; therefore, a reference to health plans, insurers, and health care providers In the definition of "entity" is not needed and should be deleted from the Bill as follows:

§ **-1 Definitions.** As used in this chapter, except as otherwise specifically provided:

..."Entity" means a [~~health care provider,~~] health care data organization, [~~health plan,~~] health oversight agency, public health authority, employer, [~~insurer,~~] health researcher, law enforcement official, or educational institution, except as otherwise defined for purposes of a particular section only....."

While we do not believe health plans should be included in this Bill, we do have concerns with other elements of HB 2532:

- The use of the term "inspect and copy," in several sections of the Bill could allow non-HMSA personnel to gain access to personal health information (PHI) stored by HMSA, and potentially inappropriately modify official records.
- In denying access to information maintained by HMSA, the Bill provides for an appeals process that would disrupt the appeals process mandated under HIPAA.
- Part II, Section 12 of the Bill specifies that healthcare providers are the owners of medical records they create. HMSA has concerns because that section does not address whether payment or health care operations records are the property of health plans. We further believe that this section should define whether claims information is considered to be a part of a medical record.
- Part II, Section 13, requires health plans to provide an annual notification of an individual's confidentiality rights. Pursuant to HIPAA, we already provide members a Notice of Privacy Practices (NPP) informing them of their privacy rights. Receiving multiple notices will create confusion for members.
- Part III, Section 22(a), further requires plans to provide a confidentiality notice upon enrollment, annually, and when terms are substantially amended. Again, this is duplicative of our obligations to provide an NPP in the same situations.

Thank you for the opportunity to testify today. We ask that you consider our concerns with HB 2532.

Sincerely,

Jennifer Diesman
Vice President
Government Relations

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Government Relations

Testimony of Laura Sherrill
Privacy and Security Officer-Hawaii Region

Before:
House Committee on Health
The Honorable Della Au Belatti, Chair
The Honorable Dee Morikawa, Vice Chair

LATE

February 5, 2014
8:35 am
Conference Room 329

HB 2532 RELATING TO HEALTH CARE PRIVACY

Chair Belatti, and committee members, thank you for this opportunity to provide testimony on HB 2532 which would make changes in state law regarding the use of health information and health care privacy.

Kaiser Permanente Hawaii opposes this bill because it does not work with existing federal law.

To summarize, this bill would create significant complications for the appropriate use of health information because it is in conflict with the federal Health Insurance Portability and Accountability Act—HIPAA whose regulations specifically address how protected health information may be used not only for treatment, payment and health care operations but also how it may be appropriately accessed for other purposes such as public health surveillance and law enforcement. What follows is a list of some of the issues we have identified with this law.

Some parts of the law are similar to provisions already in HIPAA but in almost every definition or section there are differences in the law that could prove to be significant. Under HIPAA covered entities are required to do state preemption analyses where state and federal law are contrary. Passage of this law would require a review of all policies/procedures and practices of covered entities in Hawaii as they try to determine what provision to follow. The other major question would be what about the numerous sections of HIPAA that are not even mentioned in

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this bill. Would lack of mention mean that a covered entity would follow HIPAA or that anything that is not covered in this state law is by definition prohibited?

Section 1:

Definitions: Many of the definitions are similar to HIPAA but there are overall differences throughout.

For example: Under HIPAA the definition of health care includes but is not limited to:

"preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, and ***counseling***, service, ***assessment*** or ***procedure***".

Under HB 2532, health care includes (and is limited to):

" preventative, diagnostic, therapeutic, rehabilitative, palliative or maintenance services"

Since the state definition does not include counseling, assessment or procedure are they considered health care under the state law?

Qualified Health Care Operations: The definition under HB 2532 combines parts of the HIPAA definitions of payment activities and health care operations but leaves out significant activities that are necessary for the business of health care. For example, does not include use and disclosure of PHI for conducting or arranging for medical review and legal services; for the sale, transfer, merger or consolidation of all or part of the covered entity with another covered entity; or underwriting, premium rating, and other activities relating to the creation, renewal or replacement of a contract of health insurance or health benefits.

Some definitions extend the reach of the law far beyond HIPAA.

For example:

HIPAA covers three types of entities: health care providers, health plans and clearinghouses.

HB 2532 covers health care providers, ***health care data organization***, health plan, ***health oversight agency, public health authority, employer, insurer, health researcher, law enforcement official or educational institution.***

Are other entities ready for the impact of this law?

Other definitions are more restrictive.

For example:

Under HIPAA a law enforcement official includes officers or employees of any agency of the US government, State, etc. who is empowered to: "investigate or conduct an official inquiry into a potential violation of law; or prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law"

Under HB 2532 there is a specific exception under the definition of law enforcement inquiry to exclude "a lawful criminal investigation or prosecution conducted by county prosecutors or the department of the attorney general."

Part II Individual Rights

Extends individual rights to protected health information held by employer, health care data organization, insurer or educational institution.

Part II – 11 Individual Right of Access:

HIPAA has reviewable and unreviewable reasons under which an individual can be denied access to their records. HB 2532 Part II – 11(c) lumps them all together and all denials are reviewable. Does not include the denial reason about denial of access to psychotherapy notes; denial of an inmate's requests for records if obtaining such copy would jeopardize the health, safety, etc. of the individual or other inmates. HB 2532 has an additional step whereby, if access was denied, the individual can submit a statement of the request and the entity must document the request and the reason for denial in the record and include both in any subsequent disclosure of the information.

Which process would an entity covered under HIPAA follow?

Part II – 12 Right to Request Amendment (Additions):

Under HIPAA, an individual has a right to request an amendment of his/her records and there are reasons and a detailed process under the law under which an entity can deny the amendment as well as a detailed process whereby the individual can request that his/her amendment request be added to the record.

HB 2532 has a shortened version of this right.

Again, which process would an entity under HIPAA follow?

Part II – 1 Notice of Privacy Practices

Under HIPAA covered entities are already required to provide a Notice of Privacy Practices. The required statements and language in HB 2532 are different than what is under HIPAA. Even the required language at the beginning of the notice Part II - 13 (b) is different? Will covered entities have to create two notices?

Part III -21 Restrictions on Uses and Disclosures

Under HB 2532 Part III – 21 (b) an entity will only use/disclose protected health information if the use/disclosure is properly noticed in the Notice of Privacy Practices. HIPAA requires that covered entities give examples of the types of uses/disclosures. It is not possible to include every legitimate use/disclosure in a Notice.

HB 2532 Part III – 21(c) provides that an individual can restrict any use/disclosure of his/her protected health information for any purpose as long as he/she pays for the health care out of pocket. HIPAA provides for a restriction of information back to the health plan if the individual pays out of pocket. Many providers today have electronic medical records. In order for a provider to honor a restriction request that information not be shared for treatment or health care operations such as is envisioned in HB 2532 the provider would need to document the health care on paper and then lock it away. Otherwise it might be used the next time the patient arrives for services (additional treatment) or for a quality review or another health care operation that is part of the normal business functions of a health care provider. This section is unworkable with an electronic medical record and is actually detrimental to the health care of the individual in that his/her medical information would not be available for treatment, especially in an emergency situation.

Part III – 21 (e) Every use or disclosure of protected health information shall be limited to the purpose for which it was collected. Any other use or disclosure without a valid authorization shall be an unauthorized disclosure.

So if a patient comes in for treatment and information is collected for the patient's treatment, that information cannot be used by the entity for its other health care operations? If the primary purpose was treatment and the information is needed by the workers compensation insurer for determination of coverage, the information could not be released unless an authorization was obtained – regardless of our state laws related to workers compensation

Part III- 22 Giving Notice

HB 2532 requires that health plans give notice to individuals annually. HIPAA requires once every three years. HB 2532 requires that health plans obtain the individual's signature or document the reason for failure. No such requirement under HIPAA. This is an administrative burden for the health plans.

Part III Authorization

Part III – 23 (b) – requires that an authorization be separate from other authorizations. Under HIPAA authorizations for research can be combined with an authorization to a biospecimen bank as long as the opt-in is distinct for each section. Researchers would not be allowed to do this under HB 2532.

Part III – 23 (7) include the date at which the consent to disclose ends. HIPAA allows that the use of an expiration event. Common events that are used in authorizations: end of research project; end of current treatment; upon death of the individual, etc.

Part III – 23 (d) A recipient of protected health information pursuant to an authorization under this section may use the protected health information solely to carry out the purpose for which the protected health information was authorized for release. This section seems to suggest that this law would apply not only to entities but to anyone who receives PHI pursuant to an authorization. HIPAA requires that the authorization include a statement that notifies the individual that PHI released under an authorization may not longer be covered under federal privacy rules. It does not extend the protections out to any and all recipients.

Part III -32 Individual's representative, relative or surrogate, directory information. Part III – 2 (b) seems to be addressing disclosures to persons involved in an individual's care. Does not address incapacitated patients clearly. Restricts disclosures to those for the purpose of providing health care to the individual. What about disclosures to family members of critical patients that are just for the purpose of giving updates of information – this was not defined as health care in the definitions?

Part III – 32 (c) – Directory Information – (3) what does it mean that location shall not be made if the information will reveal specific information about the individual unless the individual expressly authorizes the disclosure. Would we need to get an authorization signed? What if the pt is incapacitated?

Part III – 34 Emergency circumstances – Allows disclosure of PHI in emergency circumstances as necessary to protect the health or safety of the individual who is the subject of the PHI. What about disclosures to protect the health or safety of others? HIPAA allows these disclosures under certain circumstances (Tarasoft).

Part III – 36 Public health. HB 2532 does not include public health disclosures under FDA, OHSA or the recent changes to HIPAA that allow providers to disclose immunization records to schools with the parent's verbal agreement.

Part III – 38 Disclosures in civil, judicial and administrative procedures. Seems to suggest that PHI can be disclosed pursuant to a subpoena or discovery request only if there is a court order or authorization. Wouldn't this invalidate the current subpoena process and tie up the courts?

Part III – 39 Disclosure for civil or administrative law enforcement purposes. Would allow a disclosure pursuant to a subpoena or summons only if the civil or law enforcement agency involved shows that there is probable cause to believe the PHI is relevant to the investigation. How would they show that to a covered entity? Would they just assert it or would they have to go to court?

Part III – 42 Rights of minors (14 – 17). Section (2) Currently, minor's authorization is required in those circumstances where under applicable law they consented to the care. HB 2532 seems to suggest that a minor's authorization to disclose records is sufficient even where the minor's consent for the provision of the care is not valid (like regular medical care).

Part III Excepted Uses and Disclosures – did not include the following exception categories that are included in HIPAA: disclosures to law enforcement including those disclosures required by law such as serious injury reporting, blood alcohol levels when treating MVA victims; disclosures permitted by federal law such as disclosures for identification of suspect, fugitive or missing person; disclosures for military and veteran activities/national security and intelligence activities/protective services for the president and foreign heads of state; disclosures for organ donation; disclosures to correctional institutions and other law enforcement custodial situations; and disclosures for workers compensation. That would seem to suggest that these disclosures would no longer be permitted in our State.

In early 2000, the state enacted a state privacy rule, HRS 323C which was to be administered under the Office of Information Practices. For over a year, the Office of Information Practices conducted numerous meetings as the community met to try to figure out what the law meant when applied to the complexities of the use and disclosure of health care information within the community. In spite of much work and concern, the law went into effect. Within a matter of months the disclosure of health information as necessary to the functioning of the health care system, as well as other societal needs of the community was impacted to the point that a special session was called to suspend the law. Ultimately the next session the law was repealed. HB 2532 will create the same kind of turmoil for our health care providers and health plans. We urge the committee to hold this bill and thank you for your consideration.

HAWAII HEALTH INFORMATION CORPORATION
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February 4, 2014

LATE

Rep. Della Au Belatti, Chair
Rep. Dee Morikawa, Vice Chair
House Health Committee

Dear Chair Belatti, Vice Chair Morikawa and Members of the Committee:

The Hawaii Health Information Corporation (HHIC) HHIC is Hawaii's leading health care information organization. Our mission is to collect, analyze and disseminate statewide health information in support of efforts to continuously improve the health of the people of Hawaii and the quality and cost-efficiency of healthcare services. We have been involved in efforts to protect and secure personal healthcare information (PHI) throughout our twenty years of existence.

HHIC appreciates the opportunity to testify in opposition to HB 2532 RELATING TD HEALTHCARE PRIVACY. We have three significant concerns with the approach proposed by HB2532.

First, HB 2532 duplicates the privacy and security standards set by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA's standards are clear and generally well understood by providers and payers, having been defined by a broad set of regulations since 1996. In 2003-04, HHIC led a broad group of healthcare providers and payers in Hawaii that applied these regulations to Hawaii's circumstances. We believe that HIPAA's clear standards and significant track record prevent privacy breaches and enhance security for PHI. The separate set of different standards established by this proposal would significantly complicate compliance by all who use PHI for healthcare treatment, operations, public health and research.

Second, the bill's incorporation of civil actions into privacy and security protection may have the unintended effect of deterring the reporting of breaches of healthcare data. Such breaches must be reported under HIPAA; administrative remedies (including recently-increased penalties) are in place to address the effects of breaches on individuals. The threat of civil action and lengthy and costly litigation, however, could deter such reporting and hinder the timely redress of privacy and security breaches on individuals. It is also likely to increase the cost of the cyber insurance that protects those maintaining medical records and other information with PHI.

Finally, HB 2532 does not contain funding for the Office of Information Practices (OIP). Defining HIPAA standards has been a complex and time consuming effort for OCR, taking many years and entailing much detailed public input. Significant resources will be necessary for OIP to implement the necessary rules.

HHIC therefore recommends that this bill be held.

Sincerely,

Peter A. Sybinsky, Ph.D.
President & CEO

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Wednesday – February 5, 2014
8:35 am
Conference Room 329

LATE

The House Committee on Health

To: The Honorable Della Au Belatti, Chair
The Honorable Dee Morikawa, Vice Chair

From: David Fox
Privacy Officer

Re: HB 2532 RELATING TO HEALTH CARE PRIVACY - Testimony in Strong Opposition

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Chair Bellatti, Vice-chair Morikawa and members of the committee, thank you for this opportunity to provide testimony on HB2532. My name is David Fox, Privacy Officer for Hawai'i Pacific Health (HPH). HPH is a nonprofit health care system and the state's largest health care provider anchored by its four nonprofit hospitals: Kapi'olani Medical Center for Women & Children, Pali Momi Medical Center, Straub Clinic & Hospital and Wilcox Memorial Hospital on Kauai. HPH is committed to providing the highest quality medical care and service to the people of Hawai'i and the Pacific Region through its four affiliated hospitals, 49 outpatient clinics and service sites, more than 6,300 employees and 1,300 physicians on staff..

HPH strongly opposes this bill because it does little to provide additional patient privacy protections to the people of Hawai'i.

HPH agrees that the federal Health Information Portability and Accountability Act of 1996 (HIPAA) and its subsequent revisions only provide a baseline for the privacy and security of protected health information and thus leaves room for improvement. However, HB2532 offers no improvements and would actually cause substantial confusion across the spectrum of health care in Hawai'i. This would be especially true for the providers in small practices that don't have the resources to figure it out.

This bill appears to be very similar to HRS Chapter 323c that was passed in 1999 and subsequently repealed in 2001. The bill appears to have been introduced as HB 1451 in 2011 and was deferred by this committee after substantial opposition.

There do not appear to be any changes of significance to improve the language since being first introduced in 2011 that warrant renewed consideration.

In 2012, Hawaii passed the Health Care Privacy Harmonization Act to reduce the complexity and confusion associated with the permitted uses and disclosures of protected health information by entities covered under HIPAA. In 2012, the legislature stated it, "further finds that HIPAA and its related regulations provide a comprehensive regulatory scheme to protect the

privacy of patients' individually identifiable health information, while allowing reasonable access by health care providers, health plans, and health-oversight agencies."

HB2532 makes no mention of this Act leaving us wondering what entities covered under the Harmonization Act will have to do to comply with state law since, according to the Harmonization Act, the purpose of the Act "…is to clarify that persons and entities governed by HIPAA, who use or disclose individually identifiable health information consistent with HIPAA regulations, shall be deemed to be in compliance with Hawaii's privacy laws and rules."

As a matter of additional concern, the proposed compliance date of July 1, 2014 is not practical given the amount of effort that may be required of the covered entities in order for them to understand the conflicting language, operational changes and implementation of those changes, if this bill becomes law.

It is the position of HPH, that passage of this legislation will be a significant step backward from where we are today. Therefore, we ask that you hold HB 2532.

Thank you for the opportunity to testify.

LATE

TESTIMONY **IN SUPPORT** OF HB 2532, RELATING TO HEALTH CARE PRIVACY
COMMITTEE ON HEALTH
HOUSE OF REPRESENTATIVES
WEDNESDAY, FEBRUARY 5, 2014, 8:35 A.M.

Chairwoman Belatti and members of the House Committee on Health, I am John C. McLaren. I am an attorney in private practice with Park & Park. I am testifying personally this morning in support of the health information privacy protection concepts in HR 2532, which is virtually identical to HB 1451, that I asked Representative Scott Saiki to introduce in 2011.

HB 2532 recognizes important health information privacy rights that were originally Act 87 (1999), which became Hawaii Revised Statutes (HRS) Chapter 323C, Privacy of Health Care Information. As is recited in the preamble to Act 87, this statute was based on Article I, Section 6, Right to Privacy, in the Constitution of Hawaii. This privacy right took effect on November 7, 1978 and was a recommendation of the 1978 Constitutional Convention. Hawaii is one of a few states in the nation that has a broad constitutional privacy right. There is no parallel right in the text of the original United States Constitution or in the Bill of Rights.

HRS Chapter 323C was, in my opinion, mistakenly repealed in 2001 by Act 244, in a naive and mistaken anticipation that federal Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-91, 110 Stat. 1936 (1996), and the April 14, 2003 effective date of the federal HIPAA regulations in 45 Code of Federal Regulations (CFR) Parts 160 and 164, Standards for Privacy of Individually Identifiable Health Information (HIPAA Privacy Rule) would supercede all state laws on this subject. The HIPAA Privacy Rule did not do so because of subject matter jurisdictional limitations imposed by Congress on the U.S. Department of Health and Human Services in the enabling legislation to Public Law 104-91.

As with HB 2319 to be heard earlier this morning, HB 2532 will have to be amended to conform to the HIPAA Privacy Rule. However, there are important elements of HB 2532, particularly Section 38, Disclosure in civil, judicial, and administrative procedures, which are not adequately addressed in the HIPAA Privacy Rule regulations.

For example, the HIPAA Privacy Rule exempts all workers' compensation and automobile personal injury protection claims from its scope, and it has a very limited, diluted impact in most court-based personal injury litigation. It is a well established fact that the HIPAA Privacy Rule provides only a limited "floor" of privacy protection, and does not invalidate greater privacy protections afforded by state law.

The HIPAA Privacy Rule, and in particular, 45 CFR § 164.512 (e), Disclosures and Uses for Judicial and Administrative Proceedings, provides a loophole-ridden form of limited, and essentially illusory protection rather than any true information privacy protection because this federal rule does not bar the use of non-litigation related, collateral uses of identifiable health information such as third party information databasing by the insurance industry and its affiliate organizations.

As a result of the repeal of HRS Chapter 323C and the federally intended limitations of the HIPAA Privacy Rule, Hawaii has had no comprehensive health information privacy protection greater than the scope of the HIPAA Privacy Rule except in individual Circuit Court cases in which the litigants and the Court have adopted a health information privacy protective order following the Hawaii Supreme Court's landmark health information privacy protection decision in *Brende v. Hara*, 113 Hawai`i 424, 153 P.3d 1109 (2007).

Our Supreme Court was the first appellate court in the nation to recognize that health information privacy rights under Hawaii law, that provided greater protection than the HIPAA Privacy Rule, would not be pre-empted by the federal rule. I researched and wrote on behalf of our client, Phillip Brende, all of the appellate pleadings in *Brende*.

Brende was a writ of mandamus action, which is an extraordinary, common law form of appeal. Park & Park filed this appeal against Third Circuit Court Judge Glenn S. Hara to compel his Court to recognize that Hawaii's Constitutional Right to Privacy and Hawaii Rules of Evidence, Rule 504(d)(3), Condition as Element of Claim or Defense, which is part of HRS Chapter 626, afforded greater privacy protection from unauthorized, collateral disclosures of medical information of a personal injury litigant than the HIPAA Privacy Rule.

This mandamus action was necessary solely because HRS Chapter 323C was repealed. Section 323C-38 of this statute would have provided the basis for information privacy protection that the Supreme Court recognized in *Brende* under our Constitution and Rules of Evidence. Section 38 on pages 34-35 of HB 2532 has identical language to the repealed statute.

The Supreme Court held in *Brende* that "health information is 'highly personal and intimate' information that is protected by the informational prong of article I, section 6. The constitutional provision protects the disclosure outside of the underlying litigation of petitioners' health information produced in discovery." 113 Hawai`i at 430, 153 P.3d at 1115.

The Court also held that there was "no present legitimate need outside of the underlying litigation for petitioners' health information produced in discovery," and that "any disclosure of such information outside of the litigation would be a violation of petitioners' right to informational privacy." 113 Hawai`i at 430, 153 P.3d at 1115.

The Court granted Mr. Brende's mandamus petition to revise the protective order issued by Judge Hara to add the provision that, subject to legitimate business record keeping requirements of insurance carriers and law firms, generally described in footnote 6 of the Court's opinion, "none of plaintiff's protected health and/or medical information obtained in discovery from any source [in the case] shall be disclosed or used for any purpose by anyone or by any entity outside of [the case] without the plaintiffs' explicit written consent thereto." 113 Hawai`i at 431-432, 153 P.3d at 1117 (bracketed material added for clarification).

In 2008, at the request of the Bench/Bar Judicial Conference, a committee of volunteer

lawyers headed by Chuck Crumpton, which included me, drafted form health information privacy protective orders for use in personal injury claims and litigation. These forms are posted on the Hawaii State Bar Association website, http://www.hsba.org/forms_2.aspx.

The forms can be readily adapted to government administrative proceedings with a few minor language changes. Protective orders of all kinds are authorized by Hawaii Rules of Civil Procedure, Rule 26(c), Protective Orders, and Federal Rules of Civil Procedure, Rule 26(c), Protective Orders. Since the publication and use of the Bench/Bar forms, disputes in civil litigation over an individual's rights to health information privacy protection have virtually vanished from the Circuit Courts.

Section 38 of HB 2532 accomplishes essentially the same privacy protection as *Brende*, and with the amendment to the Section 1 definition of "Insurer" that I recommend on the next page, it would also extend this protection to all administrative proceedings, that would include all workers compensation claims before the Department of Labor and Industrial Relations and before the Labor and Industrial Relations Appeals Board, all Personal Injury Protection (PIP) disputes and all Medical Inquiry Conciliation Panel (MICP) cases before the Department of Commerce and Consumer Affairs, and to all other administrative proceedings in which a party's protected health information is placed at issue.

To my knowledge, no state agency has adopted any health information privacy protections following the *Brende* decision. The Office of Information Practices (OIP) has done very little in this area after I provided a copy of the *Brende* decision to then-OIP Director Paul Tsukiyama by letter dated November 21, 2007. I sent a similar letter also dated November 21, 2007 to then-Labor Department Director Darwin L.D. Ching. The State's evident inaction to protect the privacy rights of its citizens is disappointing and frankly deplorable.

The OIP issued an Advisory Opinion on December 3, 2010 holding that workers' compensation records at the Disability Compensation Division had a significant privacy interest under HRS §§ 92F-13(1) and 92F-14. However, OIP did not cite to *Brende* or to Hawaii's constitutional right to privacy. Section 41 of HB 2532 would require OIP to adopt rules and standards for disclosing, authorizing, and authenticating protected health information and would hopefully encourage OIP to incorporate the *Brende* decision into its rulemaking.

The Labor Department continues to have posted on its website an April 11, 2003 HIPAA information sheet which states that workers' compensation claim are exempt from HIPAA privacy protection see: http://labor.hawaii.gov/dcd/home/aboutwc/, referencing "HIPAA and its effect on workers' compensation." The information provided in the PDF document is true, but it leaves the mis-impression that Hawaii-based workers' compensation claims have no privacy protection of any kind.

By letter dated December 29, 2010, I provided to current Labor Department Director, Dwight Takamine, a copy of the *Brende* decision. The Labor Department has not mentioned the

Brende decision or its protections anywhere on its website during this current Administration.

The Disability Compensation Division (DCD) has also refused to sign and file a proposed workers' compensation health information privacy protective order that I wrote, patterned on the forms posted on the HSBA website, that was signed by the insurance defense counsel.

Brende, Hawaii's constitutional right to privacy, and HB 2532, recognize that the individual patient has a right to know about and to consent in advance, to the release and uses of her or his health information and medical records. This is essentially a right of informed consent for which there should be no disagreement under established Hawaii law.

The right to disseminate protected health information and medical records has never belonged to any health care provider, any insurer, any company, or to any government agency. HB 2532 would accordingly re-affirm and re-codify Hawaii's health information privacy protection policy that was in HRS Chapter 323C. As is the case with the HIPAA Privacy Rule, following the enactment of HB 2532, there should be no disruption in the use of protected health information for treatment and insurance billings.

I suggest the following amendments to HB 2532:

Section 1, page 6, line 21, the definition of "Insurer" should be amended to include all workers' compensation insurers and private self insured entities regulated under HRS § 386-121, Security for payment of compensation; misdemeanor, and all automobile insurers regulated under HRS Chapter 431, Article 10C, Motor Vehicle Insurance.

Subsection 11(b), page 12, line 2, and subsection 13(b)(1)(A), page 18, line 5, pertaining to an individual's right to a copy of a health care provider's records, should be amended to add that the copying of protected health information "shall be allowed using the least expensive available photocopying method or electronic media, such as a computer disc, a CD-RoM, zip drive, thumb drive, email delivery via PDF attachment, etc.; the cost of which is not to exceed the lowest prevailing business or commercial copying rate in the community." HRS § 622-57(g) should also be amended to incorporate this revised language.

Section 12, page 15, line 20, should be amended to state at the end of the first sentence that "The patient is the owner of all protected health information contained within a health care provider's records." This is consistent with Hawaii's Constitutional Right of Privacy, and the *Brende* decision recognizing this privacy right.

Section 38, page 34, line 9, the language of subsection (a) should be amended to allow for a stipulated health information privacy protective order such as the form on the HSBA website, as an additional mechanism to allow the disclosure of protected information. This should eliminate any ambiguity over the meaning of "court order," because all protective orders are signed and filed by the court, or the protective order could be signed and filed by a state agency in an

administrative proceeding. This should alleviate if not eliminate any need to file a motion to obtain a court order under the terms of the bill as originally drafted.

Subsection 38(b)(3), page 34, line 17, should be amended to add at the end of the sentence: "without the individual's or the individual's designated representative's written authorization."

Subsection 38(c)(2), page 35, lines 5-6, should be deleted. This subsection is inconsistent with the privacy protection recognized by the Supreme Court in *Brende* for a subject litigation.

The Committee should be aware that the Supreme Court has held in *Naipo v. Border*, 125 Hawai'i 31, 251 P.3d 594 (2011), a mandamus action, that under the rights recognized in *Brende*, a non-party's medical records and health information are protected from disclosure by our Constitutional Right to Privacy and by non-party's physician-patient privilege.

Finally, the Committee should be aware that the Supreme Court has before it for decision a health information authorization dispute in a Court Annexed Arbitration Program (CAAP) personal injury case pending issuance of a written decision in: *Richard Cohan, Petitioner, vs. The Honorable Bert I. Ayabe, Judge of the Circuit Court of the First Circuit, State of Hawai`i, Respondent, and Marriott Hotel Services, Inc. dba Marriott's Ko Olina Beach Club, Marriott Ownership Resorts, Inc. dba Marriott Vacation Club International and Rrb Restaurants, LLC dba Chuck's Steak and Seafood, Respondents, Real Parties in Interest*, No. SCPW-13-0000092. The Court received oral argument on October 2, 2013 and should be issuing its decision shortly. The Court's description of the issue in dispute in *Cohan* from its oral argument page is:

> Petitioner is challenging a CAAP arbitrator's order directing him to sign medical records authorizations and a stipulated qualified protective order on the ground that the authorizations and stipulated qualified protective order violate the federal Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. § 164.500 et. seq. ("HIPAA") and Article 1, § 6 of the Hawai'i Constitution. The respondent defendants contend that the authorizations and stipulated qualified protective order do not violate federal or state law. They further maintain that the stipulated qualified protective order form that the CAAP arbitrator directed petitioner to sign is the identical form that appears on the Hawai`i State Bar Association's website and was generated through the efforts of a subcommittee of the Judiciary's Bench/Bar Committee.

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